

SHERRY DYER, ACTING CHAIR
IDAHO PERSONNEL COMMISSION
P.O. Box 83720
Boise, Idaho 83720-0066
Phone: (208) 334-3345

IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

)	
)	
MARK CHRISTENSEN,)	
)	
Appellant,)	
)	IPC NO. 97-08
)	
vs.)	
)	DECISION AND ORDER ON
DEPARTMENT OF LAW ENFORCEMENT,)	PETITION FOR REVIEW
)	
Respondent.)	
_____)	

THIS MATTER CAME ON FOR HEARING ON THE PETITION FOR REVIEW on Friday, November 14, 1997. Appellant Mark E. Christensen was represented by Jay D. Sudweeks, Esq.; Respondent Department of Law Enforcement (Department) was represented by R. A. Coulter, Deputy Attorney General. The petition for review involves the hearing officer's decision dated June 25, 1997, granting the department's motion to dismiss for lack of jurisdiction. We AFFIRM.

I.

BACKGROUND AND PRIOR PROCEEDINGS

A. Facts.

On October 16, 1996, Mark E. Christensen used non-deadly force in the performance of assigned duties as an Idaho State Police Officer. Policy and Procedure No. 406 of the Department of Law Enforcement requires that an Administrative Review Board be convened when a non-lethal weapon is used on a person.¹ Christensen was notified of the scheduled review board meeting and was familiar with the department's policies regarding the purpose of the review board. The Administrative Review Board convened on November 25, 1996. Christensen appeared via telephone. Following the review of the incident, the review board made a number of determinations, among them that Christensen attend remedial training and that his supervisor should make an entry into his Franklin Planner (which functions as a working personnel file) regarding the review board's findings.

Christensen filed a timely grievance regarding the review board findings and the Franklin Planner entry. On March 11, 1997, the impartial review panel recommended that:

1. "the Department leave the letter/Franklin Planner entry in Grievant's working personnel file, with one alteration - that the phrase on the second page, third sentence, as follows: ' . . . allowing Mr. Adams to be placed by the guardrail after the physical arrest; . . .' be stricken from the entry."
2. "the Department leave the Administrative Review Board findings in place as is;"
and
3. "the Department provide remedial training as it determines is appropriate."

On April 2, 1997, the director made a final determination upholding the impartial review panel. Christensen received notice of the director's decision on April 5, 1997.

B. Appeal to Personnel Commission.

On May 9, 1997, Christensen appealed the director's final decision to the Idaho Personnel Commission. On appeal, Christensen raised as issues the disciplinary nature of the Franklin Planner entry and the review board's characterization of Christensen as "a liar", together with the director's failure to issue a final decision within the time set forth in the Department's grievance policy.

On May 23, 1997, the Department filed a motion to dismiss, arguing that the Commission lacked jurisdiction to hear the appeal. The motion was filed pursuant to Idaho Code § 67-5316(1), and was based upon the grounds that the subject matter of the appeal did not involve a disciplinary dismissal, demotion or suspension, or classification as required under Idaho Code § 67-5316(1)(a), or a right or benefit to which Appellant is entitled by law as required under Idaho Code § 67-5316(1)(b). Christensen filed a timely response to the Department's Motion.

On June 25, 1997, Hearing Officer Bergquist entered an order granting the Department's motion to dismiss. The rationale supporting the Hearing Officer's decision can be summarized as follows:

1. The Personnel Commission exercises limited jurisdiction pursuant to Idaho Code § 67-5316;
2. None of the grounds of Christensen's appeal involve dismissal, demotion, suspension, or classification.

¹ In this instance, the non-lethal weapon was Oleoresin Capsicum spray, commonly referred to as "OC" or "pepper spray."

Based upon the foregoing reasons, Hearing Officer Bergquist concluded that "the Idaho Personnel Commission does not have statutory authority to consider this appeal, and the Department's Motion to Dismiss must be granted." On July 17, 1997, Christensen filed a petition for review of the Hearing Officer's decision.

II.

ISSUES

- A.** Is the director's decision to uphold the recommendations of the impartial review panel an appealable matter under Idaho Code §67-5316(1)(a) (disciplinary dismissal, demotion, suspension or classification) or Idaho Code §67-5316(1)(b) (failure to provide a right and/or benefit to which the employee is entitled by law)?
- B.** Did the Department's failure to follow the time lines set out in the Department's grievance policy regarding notification deprive Christensen of his rights to due process?

III.

STANDARD AND SCOPE OF REVIEW

The standard and scope of review on disciplinary appeals to the IPC is as follows:

When a matter is appealed to the Idaho Personnel Commission it is initially assigned to a Hearing Officer. I.C. § 67-5316(3). The Hearing Officer conducts a full evidentiary hearing and may allow motion and discovery practice before entering a decision containing findings of fact and conclusions of law. In cases involving Rule 190 discipline, the state must prove its case by a preponderance of the evidence. IDAPA 28.01.01.201.06. That is, the burden of proof is on the state to show that at least one of the proper cause reasons for dismissal, as listed in I.C. § 67-5309(n) and IDAPA 28.01.01.190.01, exist by a preponderance of the evidence.

On a petition for review to the Idaho Personnel Commission, the Commission reviews the record, transcript, and briefs submitted by the parties. Findings of fact must be supported by substantial, competent evidence. *Hansen v. Idaho Dep't of Correction*, IPC No. 94-42 (December 15, 1995). We exercise free

review over issues of law. The Commission may affirm, reverse or modify the decision of the Hearing Officer, may remand the matter, or may dismiss it for lack of jurisdiction. I.C. § 67-5317(1).

Soong v. Idaho Dep't of Health and Welfare, IPC No. 94-03 (February 21, 1996), *aff'd* Case No. CV 96-00106 (Dist. Ct. 2nd Dec. 6, 1996) (footnote omitted).

IV.

ANALYSIS

A. Relevant Statutory and Constitutional Provisions.

In order to resolve this appeal, the Commission must apply the following statutory and constitutional provisions:

(1) Appeals shall be limited to the following:

(a) Any classified employee who has successfully completed the entrance probationary period may, after completing the departmental grievance procedure, appeal a disciplinary dismissal, demotion or suspension, or classification.

(b) Any classified employee may, after completing the departmental grievance procedure, appeal the failure of an appointing authority to provide a right and/or benefit to which the employee is entitled by law.

I.C. §6705316(1)(a) and (b), (1986).²

No person shall be . . . *deprived of life, liberty or property without due process of law.*

U.S. Const. amend. V., Idaho Const. art I, §13 (emphasis added).

B. Application of Statutory and Constitutional Provisions.

² Idaho Code §67-5316 was amended in 1997. 1997 Idaho Session Laws, ch. 364, p. 1073. The amendments were not effective until July 1, 1997. This appeal arose under the statute prior to the 1997 amendments. The older version, in effect at the time this appeal arose, is quoted above.

This petition does not present any questions of fact. Both sides apparently agree that the decision at issue is that of the director upholding the findings and recommendations of the impartial review panel. Further, both sides apparently agree that the impartial review committee and the director failed to comply with the time lines established in the Department's grievance procedure. Therefore, the questions before the Commission are questions of law involving the application of the statutes to the issues presented.

1. Discussion re: Idaho Code § 67-5316(1)(a) and (b).

The Idaho Court of Appeals has explained that Idaho Code § 67-5316 "explicitly confers limited jurisdiction by stating that the Commission can only hear certain types of disputes." *Stroud v. Department of Labor and Ind'l Serv.*, 112 Idaho 891, 893, 736 P.2d 1345, 1347 (Ct. App. 1987). See also, *Sheets v. Idaho Dep't of Health and Welfare*, 114 Idaho 111, 113, 753 P.2d 1275, 1259 (1988) (statutes are dispositive, precluding appeal of matters not expressly denominated). The matters expressly denominated in subsection (1)(a) are "disciplinary dismissal, demotion or suspension, or classification." It is undisputed that Christensen was neither dismissed, demoted, suspended, nor classified as a result of the incidents of October 16, 1996.

In an analogous case, this Commission addressed the issue of whether letters of reprimand constituted appealable "discipline" in the matter of *McKay v. Dep't of Health and Welfare*, IPC No. 85-14 (March 25, 1986). The Commission upheld the Hearing Officer's determination that a letter of reprimand was not appealable to the Commission. The Commission decision interpreted Idaho Code § 67-5309(n), which contains language identical to that of Idaho Code § 67-5316 regarding disciplinary dismissal, demotion, and suspension.

Also in its ruling in *Stroud*, the Court of Appeals rejected the argument that the "right and/or benefit" language could be based upon statutory, decisional and constitutional law. *Id.* As with *Stroud*, the case at bar appears to involve a matter specifically excluded by the grievance statute (a notation in a working personnel file) that is being framed by Christensen as a "right and/or benefit" to which he is entitled.

Christensen's arguments that the director's actions are appealable under Idaho Code § 67-5316 are contrary to the express language of the statute the decisions of this Commission interpreting that statute, and the Idaho appellate courts which have had opportunity to review the provision.

2. Federal and State Constitutional Due Process Provisions.

Both article V of the U. S. Constitution and article I, § 13 of the Idaho Constitution provide that no person shall be deprived of life, liberty or property without due process of law. The Idaho Supreme Court set out the essential due process elements of an administrative proceeding in *Arnzen v. State*, 123 Idaho 899, 904, 854 P.2d 242, 247 (1993):

It was equally well-established that due process requires, at a minimum, notice of the contemplated action and notice of the basis and evidence relied upon for the contemplated action, and an opportunity to respond. *Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495. The first component of the due process requirement, notice, may be an oral or written notification of the charges against the employee and the basis and evidence supporting those charges. *Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495. The second component of the due process requirement, opportunity to respond, is an opportunity for the employee, either in person or in writing, to present his or her reasons "why *proposed* action should not be taken. . . ." *Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495 (emphasis added).

The record in this matter is clear that neither the impartial review panel nor the director took any action which would deprive Christensen of any property right which would entitle him to due process rights. He was not dismissed, and suffered no suspension, demotion, or cut in

pay. Neither was he deprived of a right or benefit to which he was entitled. Nevertheless, Christensen was provided notice and an opportunity to respond at all stages in the proceeding leading up to this appeal, including the Administrative Review Board, and the impartial review panel.

There is no support, either in state or federal constitutional provisions or in case law, to support Christensen's contention that the failure of the impartial review panel or the director to strictly follow the time lines established by the Department grievance policy deprived him of any due process to which he might be entitled.

Christensen's argument that he has a right to appeal under Idaho Code § 67-5316(1)(b) because due process was a "right and/or benefit" to which he was entitled must also fail. As discussed elsewhere herein, the department had taken no action which deprived Mr. Christensen of any property interest which would even entitle him to due process rights. This argument also fails in light of the Court of Appeals decision in *Stroud*, 112 Idaho at 893, 736 P.2d at 1347, which specifically addressed the constitutional argument.

V.

CONCLUSION

For the reasons set out above, this Commission lacks jurisdiction to hear this appeal under Idaho Code § 67-5316(1). Appellant's due process claims are without merit and could not, in any event, confer jurisdiction to this Commission.

VI.

STATEMENT OF APPEAL RIGHTS

Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code §

67-5317(3). The District Court has the power to affirm, or set aside and remand the matter to the Commission upon the following grounds, and shall not set the same aside on any other grounds:

- (1) That the findings of fact are not based on any substantial, competent evidence;
- (2) That the commission has acted without jurisdiction or in excess of its powers;
- (3) That the findings of fact by the commission do not as a matter of law support the decision. Idaho Code § 67-5318.

DATED this 18th day of December, 1997.

BY ORDER OF THE
IDAHO PERSONNEL COMMISSION

/s/ _____
Sherry Dyer, Acting Chair

/s/ _____
Peter Boyd

/s/ _____
Ken Wieneke

/s/ _____
Don Miller

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing DECISION AND ORDER ON MOTION TO DISMISS in *Christensen v. Department of Law Enforcement*, IPC No. 97-08, was delivered to the following parties by the method stated below on the 18th day of December, 1997.

FIRST CLASS MAIL

Jay Sudweeks

Attorney at law
516 Second Street East
P.O. Box 1846
Twin Falls, ID 83301

STATEHOUSE MAIL

Ron Coulter
Deputy Attorney General
Department of Law Enforcement
Statehouse Mail

/s/_____
Val Rodriguez